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No. 87-319

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

DALE ABRAHAMS, *et al.*, Objectors,

Petitioners,

v.

LOUIS SHULMAN, Derivatively on Behalf of CENTRAL JERSEY INDUSTRIES, INC., and TRIANGLE INDUSTRIES, INC.,
and CENTRAL JERSEY INDUSTRIES, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT TRIANGLE INDUSTRIES, INC. IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals erred in affirming by judgment order the decision of the District Court approving -- after careful review of an extensive, fully developed factual record -- the arm's-length, negotiated settlement of a shareholders' derivative action, when a more detailed written opinion by the Court of Appeals would have no precedential value, when no error of law appears, and when the decision of the case does not turn on the interpretation of any Federal Rule of Civil Procedure or Rule of Evidence.

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COUNTER-STATEMENT OF THE CASE

A. Preliminary Statement

This case involves simply the decision of a District Court approving, after careful review of an extensive factual record, the arm's-length, negotiated settlement of a shareholders' derivative suit, and the subsequent unanimous ruling

of the Third Circuit Court of Appeals affirming by judgment order the District Court's decision. The courts below did not decide any issue of law that warrants further review. Indeed, the decisions rendered in this case turn upon the facts alone, and affect primarily the interests of the litigants alone.

Petitioners' lengthy arguments boil down to a few simple issues: Whether the lower courts were required to write detailed opinions, whether the District Court's decision was supported by the record and whether there was an error in the interpretation of state law or of local court procedures.

Not one of these issues presents a question of such importance as to warrant the granting of a writ of certiorari. First, the only questions of law petitioners have raised involve the interpretation either of state law or of internal court procedure. These questions do not rise to a level of general importance. In any event, petitioners are simply wrong in their interpretation and application of the relevant law and procedure.

Moreover, petitioners are wrong on the facts. Not only have they distorted and misstated the facts of this case -- as they consistently did in the courts below -- but they simply have chosen to ignore the vast quantity of evidence the District Court had before it when it considered whether or not to approve the settlement in question.

When one cuts through petitioners' dramatic (but ultimately baseless) protestations of abuse of judicial power and denial of due process, one sees petitioners' case for what

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it really is: an attempt to have this Court review the record developed below to determine whether the District Court had before it all relevant facts enabling it to make an informed, objective determination about the fairness, reasonableness and adequacy of the proposed settlement of the derivative action. However, that is certainly not a proper reason to grant certiorari.

B. The Parties

Respondents Triangle Industries, Inc. ("Triangle") and Central Jersey Industries, Inc. ("CJI") are both Delaware corporations. Petitioners' statement that CJI is a New Jersey corporation (petition at 9) is incorrect. CJI became a Delaware corporation in July of 1986. Petitioners are stockholders of CJI who together own only a small percentage of the outstanding common stock of that company.

C. The Rowe Transaction

In the latter part of 1984, Triangle purchased from certain shareholders of CJI approximately 22% of the outstanding capital stock of CJI. Following the purchase, in early April 1985, Triangle recommended that CJI acquire from Triangle all of the capital stock of Rowe International, Inc. ("Rowe"), a Triangle subsidiary, for the stated purpose of providing CJI with a much-needed operating company whose

business complimented that of CJI. (291a-97a, 301a, 328a-30a, 411a-12a, 767a-68a, 1082a, 1086a) *

In their petition, as in the courts below, petitioners state that Triangle "caused" CJI to purchase Rowe. Petition at 11-12. In so describing the Rowe transaction, petitioners once again have deliberately ignored the record, which shows that, in light of Triangle's 22% ownership of CJI's common stock, special care was taken and special procedures were followed in connection with this transaction, including the following:

(1) the appointment of a special committee of the CJI board to consider the proposal, consisting of the two members of the CJI board who had no relationship to Triangle;

(2) the retention of an experienced, well-regarded outside law firm to act as special counsel to the special committee; and

(3) the engagement by the special committee of an equally well-known and respected investment banking firm, L.F. Rothschild, Unterberg, Towbin ("Rothschild"), to evaluate the proposed transaction. (27a-28a, 768a-70a, 1086a)

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* References are to the joint appendix and supplement to joint appendix filed in the Third Circuit.

Petitioners assert, as they did below, that "Rothschild was in a fundamental conflict of interest with CJI." Petition at 15. The record shows otherwise. Although Rothschild previously had acted as one of a number of market makers in Triangle securities and had performed banking services for Triangle from time to time (24a, 51a, 304-05a), neither Rothschild nor the committee considered that firm's familiarity with Triangle to be an impairment to its ability to fulfill its responsibilities in connection with the Rowe transaction. Quite the contrary, it was believed by all concerned that Rothschild's experience with Triangle/Rowe was of real benefit to CJI. (304a-05a, 412a-14a, 724a-25a) In any event, the extent of the relationship with CJI was fully disclosed to the CJI board. (24a, 304a)

After their retention, special counsel to the committee, along with its members, negotiated with representatives of Triangle and its counsel regarding the terms of the proposed transaction including the ultimate price to be paid by CJI for Rowe, and Rothschild did its "due diligence." (32a-33a, 332a-38a, 416a *et seq.*, 1142a-65a) After a detailed analysis of the proposed transaction, the committee opined that the CJI board of directors should approve the transaction. Thereupon, based on the recommendation of the committee, the board of CJI unanimously approved the acquisition of Rowe. (51a-52a, 53a-57a, 1142a)

D. The Terms of the Acquisition

As a result of its board's action, CJI, on June 3, 1985, purchased all of the capital stock of Rowe for a price of

$68.5 million (652a, 1147a).* The purchase price was paid by CJI in the form of (a) 625,000 shares of cumulative convertible preferred stock, valued at $20 million (the "Series A preferred stock") and (b) a 15% note in the principal amount of $48.5 million, payable in one year, on June 3, 1986, or earlier upon the completion of a contemplated financing by CJI, and bearing an interest rate of 18% after maturity (the "note"). The Series A preferred stock paid dividends at a rate below the then-prevailing market rate for a company of CJI's credit standing, was convertible into CJI common stock on a share-for-share basis, and was entitled to vote with the outstanding common stock on a share-for-share basis. When added to its common stock holdings, the Series A preferred stock gave Triangle approximately 44.8% of the combined voting power of CJI's capital stock. Being equity, not debt, the Series A preferred stock also enhanced the balance sheet of CJI. (53a-57a, 772a, 1086a, 1087a-92a, 1142a *et seq.*)

E. The Derivative Action

On June 25, 1985, shortly after the consummation of the Rowe acquisition, respondent Shulman, the plaintiff below and a shareholder of CJI, filed this derivative action on behalf of CJI against Triangle. The complaint alleged that CJI's purchase of Rowe from Triangle was a waste of CJI's corporate assets for the benefit of Triangle and constituted a

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* Petitioners erroneously state -- once again -- that the purchase price of Rowe was $73.5 million. They also claim that the price paid for Rowe was 73.5 times Rowe's earnings. Petition at 12. The evidence submitted to the District Court showed this contention to be wildly inaccurate. (652a-53a, 657a)

breach by Triangle and its representatives on CJI's board of fiduciary duties allegedly owed to CJI shareholders. The main relief sought by Shulman was rescission of the Rowe transaction. (13a–14a) Triangle filed an answer denying the material allegations of the complaint, and pretrial discovery then ensued. (584a–87a, 773a, 795a–96a)

In November 1985, counsel for the parties in that action commenced discussions regarding a possible settlement of the action. During those discussions, counsel for Triangle advised Shulman's counsel that CJI management then had under consideration a recapitalization (the "recapitalization") which was intended, among other things, to improve CJI's cash flow. (587a–88a, 773a) Thereafter, counsel for Shulman, along with its retained expert,* participated with the representatives and counsel for CJI and Triangle in the negotiation of the specific terms of the recapitalization, in the hope that a basis for the settlement of the action might be found. (575a–76a, 587a–88a, 773a)

F. The Settlement

The result was a settlement in principle (the "settlement") that was publicly announced in a press release issued

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* Petitioners assert in their petition, as they did below, that plaintiff "retained" another "expert." Petition at 17. As was pointed out to the District Court, this is not true. (737a–38a, 942a–43a) In any event, the alleged "report" of that supposed expert, relied upon by the petitioners, was shown before the District Court to be entirely inaccurate. (650a–57a)

by CJI on November 29, 1985. As set forth in the press release, the settlement was "subject to the completion of certain pretrial discovery proceedings and to the negotiation and execution of a definitive settlement agreement, and [was] also subject to the approval of the settlement by the New Jersey District Court." (1257a)

Thereafter, Shulman completed his pretrial discovery, including review of additional documents and the taking of depositions. (774a) On February 13, 1986, a definitive settlement agreement was executed by the parties. (511a) Pursuant to an order of the District Court dated February 25, 1986, a notice of the settlement was mailed to CJI shareholders on March 3, 1986, advising them that a hearing on the settlement would be held on April 14, 1986 (subsequently adjourned to April 28, 1986). (533a, 760a) Prior to the hearing, the board of directors of CJI reviewed the terms of the settlement and, by the unanimous vote of its three non-Triangle members, approved the settlement "as being in the best interests of CJI and its shareholders." (608-09a)

Pursuant to the terms of the settlement, Triangle exchanged the shares of CJI common stock which it had purchased in 1984, and all of the Series A preferred stock obtained on the Rowe transaction, in return for 320,000 shares of a new Class C common stock of CJI ("Class C common stock"), 1,250,000 shares of a new Class B preferred stock ("Class B preferred stock"), warrants to purchase 625,000 shares of CJI common stock at $40 per share and warrants to purchase 500,000 shares of CJI common stock at $32 per

share. The Class C common stock carried three votes per share. The Class B preferred stock did not have voting rights, was not convertible into CJI common stock and was redeemable at any time by CJI at a price equal to its liquidation preference. (74a–80a, 774a–75a, 1105a *et seq.*)

Also, as part of the settlement, the terms of the note received from CJI in connection with the Rowe transaction were renegotiated by counsel for plaintiff to extend the maturity date for almost five years, and to reduce the interest payable subsequent to June 3, 1986, with an added limitation on payment of interest in the later years should CJI not meet certain minimum income levels. (524a–31a, 1224a, 1258a)

G. The Benefits of the Settlement

In connection with the hearing on the settlement, it was pointed out to the District Court that the settlement resulted in a number of significant benefits to CJI (as well as a number of corresponding disadvantages to the defendant, Triangle), including the following:

1. The exchange of CJI securities by Triangle and the modification of the note resulted in a substantial diminution of the annual dividend and interest obligations of CJI, thereby improving CJI's cash flow. (575a–80a, 659a, 775a–76a, 807a–08a, 1224a–25a)

2. Also, the record below reflected that, as a result of the arm's-length negotiations with plaintiff's counsel,

Triangle's share of both the vote and the earnings and equity potential of CJI actually *decreased*. (668a, 726a–27a, 776a, 1114a)

3. The evidence at the settlement hearing also revealed that, as a result of the recapitalization negotiated by plaintiff's counsel, between 5%–10% of the total consideration Triangle initially received from CJI for Rowe was shifted from dividend-paying preferred stock of CJI to warrants to acquire -- at $32 and $40 per share -- CJI common stock, then selling in the $22 range. (713a, 718a–19a, 777a, 806a)

4. The recapitalization further provided that, if Triangle exercised its warrants, CJI would not issue common stock but, instead, would pay the difference between the exercise price of the warrant and market price of the common stock in cash. Thus, any potential for Triangle to increase its percentage ownership of voting control of CJI as a result of the recapitalization was eliminated. (665a, 716a–17a, 730a, 777a, 1110a–11a) If the warrants were in the hands of and exercised by a party other than Triangle or any of its affiliates, the payment terms provided for in those circumstances assured that Triangle's position in CJI would be diluted by each such exercise of the warrants and Triangle would not be in a position to cause CJI to pay out needed cash. (665a, 718a–19a, 730a–31a, 777a–78a, 1110a, 1134a–35a)

Based solely on these and other direct financial benefits of the settlement, plaintiff's expert advised the District Court that the settlement had "a present value to CJI in excess of $10 million." (580a)

H. The Petitioners

On April 2, 1986, certain objectors (the "petitioners")* filed a "Notice of Intention to Object to Proposed Settlement," listing some 23 "objections" to the settlement. (559a) Three weeks later, on April 22, 1986, only four business days before the scheduled hearing on the settlement, petitioners, without first seeking permission of the District Court, served a 62-page "first" set of interrogatories and "first" request for production of documents, demanding extensive (and largely irrelevant) information and materials from both Shulman and Triangle. (1726a, 1729a)

Shulman's counsel sought to provide petitioners with responses to the interrogatories and, referring to the document demand, reminded their attorney that he had previously, in early March 1986, been given access to Shulman's litigation file and to all of the documents produced by Triangle during the discovery stage of the action. Counsel for petitioners conceded that he had not at that point reviewed the available discovery record nor any of the papers submitted to the District Court in support of the settlement. (1792a-95a)

I. The Settlement Hearing

Perhaps as a result, at the hearing on the settlement on April 28, 1986, petitioners did not attempt to conduct an

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* Not all of the persons who filed objections in the District Court participated in the subsequent appeal. For simplicity's sake, however, the objectors shall be referred to as "petitioners" herein.

evidentiary hearing, although they clearly had an opportunity to do so. (610a–34a) They did not seek to produce or examine any fact witnesses. Nor did they examine Shulman's expert (who was present at the hearing) or offer any expert testimony to rebut the affidavit of that expert on the subject of the value of the settlement to CJI. (631a)

Instead, petitioners did no more than advise the District Court that "[w]e require some prehearing procedures here." (613a) In response, the District Court informed petitioners that it would not, "at this stage of the proceeding," permit "shopping list" type of discovery. (625a) Quite reasonably, we submit, the District Court stated that "I am not inclined to embark upon massive discovery in this case unless I'm first persuaded there is a reason to." (621a)

Petitioners' assertion that the District Court denied them pretrial discovery and an evidentiary hearing, and "summarily" approved the settlement (petition at 18) is thus patently false and is contradicted by the record below. Indeed, in order to afford petitioners full opportunity to persuade it of the reasonableness of their position, the District Court, at the April 28 hearing, did the following:

First, it directed the parties immediately to turn over to petitioners "everything" -- *i.e.*, all documents that had been produced or obtained by the parties during the litigation and settlement stages of the case. (629a, 630a)

Second, the Court granted counsel for petitioners two weeks, as the Court put it, to "show us there is some

good-faith basis to believe that the proposed settlement is improvident or improper or in some way tramples the rights of the people who are objecting." (621a)

Prior to the April 28 hearing, the District Court had received affidavits and memoranda from Shulman and Triangle, supporting the fairness and reasonableness of the settlement and rebutting, point-by-point, petitioners' list of "objections." (559a, 573a, 575a, 583a, 594a-606a, 607a, 763a, 789a, 836a) Based upon his review of these previously submitted papers, the District Court, at the hearing, stated that "[M]y tentative feeling was that the settlement was appropriate. I was going to confirm it." (631a) However, the Court immediately went on to say the following:

> On the other hand, I don't want to bring down the curtain completely without giving these people [petitioners] a chance to be heard. If they show me enough to make me -- to move me, then I'm going to have to reconsider the whole thing, including opening up the discovery . . . . (631a-32a)

It was for this reason -- in order to give petitioners the opportunity to show that the settlement was inappropriate or that further discovery was in order -- that the District Court granted petitioners additional time to present their case.

J. The Post-Hearing Proceedings

Thereafter, all parties, including petitioners, submitted additional affidavits and extensive memoranda of law. In their papers, Shulman and Triangle rebutted each and

every claim made in opposition to the settlement on behalf of petitioners.

As a result, the District Court, in passing upon the settlement, had before it a substantial record -- both "factual" in the form of affidavits, and "legal" in the form of memoranda -- compiled by all parties, including petitioners. (646a, 650a, 658a, 710a, 784a, 862a, 923a) Based upon this record -- of which 1,852 pages later was submitted as the Appendix in the Third Circuit -- the District Court, on June 3, 1986, issued an order and judgment which, among other things, approved the settlement as "fair, reasonable and adequate" and authorized the parties to consummate the settlement. Petition at A5-A9. It is from this order and judgment that petitioners appealed to the Court of Appeals for the Third Circuit. (758a)

In connection with that appeal, however, petitioners did not seek a stay, from either the District Court or the Court of Appeals, of any steps in connection with the settlement. Nor did they request an expedited appeal in the Court of Appeals. Consequently, following the District Court's decision, the parties took steps in fulfillment of the terms of the settlement. (1590a, 1797a, 1813a) Among other things, CJI proceeded with a public financing intended to raise funds to pay off the note and for other purposes.

On August 1, 1986, CJI sold to the public a total of $100 million of convertible preferred stock and $287.5 million of subordinated debentures. (1583a, 1655a) The purchasers

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of these securities, of course, bought preferred stock and/or debentures in CJI which included Rowe, and a portion of the proceeds of the public offerings was, in fact, used by CJI to pay off the note which was issued to Triangle in connection with the Rowe transaction and which was modified by the settlement. Moreover, in connection with the issuance of the securities on the public offerings, CJI and Triangle agreed to a further exchange of the securities issued to Triangle in connection with the recapitalization in order to reduce the annual dividends payable on CJI's preferred stock. (1609a, 1679a)

As of today, therefore, the settlement has been consummated, Rowe is an integral part of CJI, the securities issued to Triangle in connection with the settlement have been exchanged for other CJI securities, and hundreds of public investors have, since the District Court's approval of the settlement, purchased new securities of CJI in reliance on the completion of the Rowe transaction and the settlement of this action.

K. The Appeal

In the Court of Appeals, petitioners argued, first, that they were denied an evidentiary hearing on the fairness of the settlement, and second, that the District Court erred in failing to issue a written opinion detailing the reasons for its approval of the settlement.

In so arguing, petitioners once again misstated the facts in blatant disregard of the record that had been devel-

oped below. For this reason, Triangle, CJI, and Shulman supplemented the three-volume appendix submitted by petitioners with an additional three volumes of exhibits -- all for the purpose of demonstrating to the Third Circuit that the District Court had based its decision on a fully developed record.

It was in the Court of Appeals that petitioners also raised for the first time the question of whether the new Class C common stock issued by CJI as part of the recapitalization violated the New Jersey Business Corporation Act, by granting holders of that new class of stock three votes per share, while holders of other common stock had one vote per share.

On May 27, 1987, a panel of the Court of Appeals unanimously affirmed the District Court's order by means of a judgment order. Petition at A1. A petition for panel rehearing and rehearing *en banc* was denied on June 24, 1987. Petition at A3.

REASONS FOR DENYING THE WRIT

The Petition Presents No Issue Worthy Of Review

The petition for writ of certiorari should be denied for the following reasons:

1. It raises no issue of sufficient importance warranting review by this Court.

2. The rulings below turn upon the facts of this particular case and are fully supported by the record developed below.

3. The decision of the courts below to rule without issuing written opinions detailing their findings and conclusions is entirely consistent with the decisions of this Court, of the Third Circuit and of other courts.

4. The Court of Appeals' ruling by judgment order in this case was authorized by that Court's own internal procedures, because (a) a detailed opinion would have no precedential value, (b) no error of law appeared in the District Court's decision, and (c) this is a civil diversity case, the decision of which does not turn upon the interpretation of the Federal Rules of Civil Procedure or any Rules of Evidence.

A. The Petition Raises No Substantial Question Worthy Of Review

The petition here, stripped of its lofty constitutional rhetoric, essentially involves only a few simple complaints:

- that the District Court's decision was not supported by the record;

- that the issuance of a new class of common stock as part of the settlement in issue violated New Jersey's Business Corporation Act, Section 14A:7-2;

- that the District Court failed to set forth in detail the reasons for its decision; and

- that the Third Circuit Court of Appeal's failure to write a lengthy opinion violated that Court's internal operating procedures.

On their face, none of these issues presents a question of significant general importance warranting review by this Court. The question of the importance of the issues involved in a case is of particular significance in the decision whether to grant a writ of certiorari. However, as this Court has noted previously, the concept of importance means "of importance to the public as distinguished from that of the parties." *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). *See also Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (this Court does not "sit for the benefit of the particular litigants," and the problem presented to it must reach "beyond the academic or the episodic").

The issues presented by petitioners here do not satisfy any of these requirements. First, the interests involved in this case are those of the litigants alone.* Second, the decisions below turn solely on the facts of this particular case. Finally, to the extent petitioners have raised legal questions,

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* Arguably, the interests of the investors who participated in the public offering after the settlement was approved would be implicated at this stage of the litigation, but only in the event of a reversal and ultimate disapproval of the settlement.

those issues are limited to matters of state law and internal court procedure. Again, the resolution of these issues is of real importance only to the litigants in this case. In short, there simply are no issues presented here which are so unique, complex or universally significant as to warrant this Court's review.

B. This Court Should Not Grant Certiorari To Review The Sufficiency Of The Evidence

The ruling of the District Court was a factual determination of the fairness, reasonableness and adequacy of the terms of the settlement of the shareholders' derivative suit. No legal question was raised by petitioners before that Court. The recital above demonstrates that there was abundant evidence supporting the Court's approval of the settlement.

Petitioners now essentially ask this Court to overturn the District Court's factual assessment of the record by ruling that there was insufficient evidence in that record supporting the Court's decision, and by requiring that the now-consummated settlement be undone and additional evidentiary hearings be held. However, this Court has held that this is not a proper reason to grant certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Indeed, this is a particularly inappropriate case in which to grant certiorari because, as we have demonstrated, the petition frequently makes assertions contrary to the re-

cord. This is therefore not a case in which the Court may rely on petitioners to present a clear, concise and accurate picture of the evidence and issues below.

Inasmuch as petitioners cannot hope to have this Court review the factual assessment of the evidence, they wrap their argument in the cloak of a "legal" theory, namely, an alleged denial of due process resulting from the lower court's supposed refusal to order additional evidentiary hearings on the fairness of the settlement. But this is a theory having no application here. Once again, the record speaks for itself. Not only were petitioners given access to documents and other materials obtained during discovery in the shareholders' derivative litigation, but the District Court also granted petitioners additional time in which to develop the record further after the initial settlement hearing was held. Petitioners therefore had ample opportunity to develop evidence in opposition to the settlement, and in fact, a good deal of such evidence was before the Court.

Thus, the District Court, prior to making its decision, had before it all the information and arguments necessary to weigh carefully the relevant factors from both respondents' perspective and petitioners' perspective, and to reach an informed conclusion regarding the fairness of the settlement. Petitioners were granted all process which was their due.

C. The Lack Of Written Opinions From The Courts Below Raises No Issue Of A Denial Of Due Process Or A Departure From Accepted Judicial Procedures

1. The Orders Entered Below Are Consistent With The Decisions Of This Court And Of The Third Circuit

The fact that neither the District Court nor the Court of Appeals issued a written opinion detailing its respective findings of fact and conclusions of law poses no issue requiring review by this Court. On this point, petitioners simply are wrong on the law. The entry of orders below without opinions was entirely consistent with the decisions of this Court and of the Third Circuit.

First, petitioners' reliance on Rule 52(a) of the Federal Rules of Civil Procedure is misplaced. On its face, that rule applies only when actions are tried upon the facts without a jury, or when the court grants or refuses an interlocutory injunction. That is not the situation here. There was no ultimate determination here of the controverted, factual issues in this case. On the contrary, as we noted below, district courts are not expected or required to make ultimate determinations on issues of fact and law in approving settlements of derivative actions. *See, e.g., Girsh* v. *Jepson*, 521 F.2d 153, 160 (3d Cir. 1975); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). Each of the appellate court cases cited by petitioners on pages 27 and 28 of their petition involved either an action tried on the merits or an injunction. Neither of those situations is before this Court in the instant case.

Second, although some appellate courts have required district courts to issue opinions detailing the basis for their rulings on proposed settlements, *see, e.g.*, *Plummer* v. *Chemical Bank*, 668 F.2d 654, 659 (2d Cir. 1982); *Cotton* v. *Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977), this Court has previously indicated that the lack of a detailed opinion will not be fatal to the lower court's ruling so long as the record below was sufficiently developed to enable the reviewing court to determine that the lower court had before it all facts essential to its decision, and the record contained sufficient evidence supporting the court's decision. In *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc.* v. *Anderson*, 390 U.S. 414, 437 (1968), this Court stated:

> If, indeed, the record contained adequate facts to support the decision of the trial court to approve the proposed compromises, a reviewing court would be properly reluctant to attack that action solely because the court failed adequately to set forth its reasons or the evidence on which they were based.

Petitioners also rely on *Taylor* v. *McKeithen*, 407 U.S. 191 (1972). In that case, this Court did vacate the judgment below and remand for further proceedings, but the Court's decision was not based solely on the lack of an opinion by the court of appeals. Rather, the Court in that case specifically noted, consistent with the *Protective Committee* case, that "this record does not fully inform us of the precise nature of the litigation," 407 U.S. at 194, and added:

> We, of course, agree that the courts of appeals should have wide latitude in their decisions of whether or

> how to write opinions. That is especially true with respect to summary affirmances. . . . But here the lower court summarily reversed without any opinion on a point that had been considered at length by the District Judge. *Under the special circumstances of this case*, we are loath to impute to the Court of Appeals reasoning that would raise a substantial federal question when it is plausible that its actual ground of decision was of more limited importance. *Id.* at 194–95 n. 4. (Emphasis added.)

See also In re Flight Transportation Securities Litigation, 730 F.2d 1128, 1136 (8th Cir. 1984), *cert. denied*, 469 U.S. 1207 (1985) (the district court had before it the information necessary to consider the fairness of the proposed settlement); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 125 and n. 9 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975)(same). *

The issue, then, is not whether the District Court or the Court of Appeals set forth the basis for its conclusions in an opinion but, rather, whether the record supports those conclusions. As we already have demonstrated, the record below contained ample evidence favoring the settlement and, furthermore, demonstrates that the District Court had before it

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* We have found no Third Circuit decision supporting petitioners' claim that a detailed opinion is required in all cases involving a disputed settlement proposal. *See* Petition at 27–31. Of the Third Circuit cases cited by petitioners, only *Girsh* v. *Jepson*, *supra*, 521 F.2d 153 (3d Cir. 1975) and *Shlensky* v. *Dorsey*, 574 F.2d 131 (3d Cir. 1978), involved settlements of class actions. Petitioners' reference to *Shlensky* is misleading. In that case, the court in fact affirmed the district court's approval of (footnote continued)

sufficient evidence on both sides of the dispute to permit it to weigh carefully the relevant factors and reach an informed decision.*

2. The Judgment Order Of The Third Circuit Is Entirely Consistent With That Court's Internal Procedures

The decision of the Third Circuit to terminate the appeal of this case by means of a judgment order was clearly authorized by Chapter 6, Sections A(1)(a) and A(1)(b)(4) and (5) of that Court's Internal Operating Procedures (petition at 8–9) because (a) a written opinion in this case would have no

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the settlement. It vacated only that portion of the judgment dealing with the award of fees. 574 F.2d at 149, 152. In *Girsh*, the court noted that the district court's opinion did not adequately set forth its findings, but in keeping with the *Protective Committee* holding, it undertook its own evaluation of the record and particularly emphasized in vacating the district court's judgment that the record in that case, unlike the record here, was insufficiently developed to enable it to determine whether there was adequate support for the settlement in question. 521 F.2d at 159–160.

* Petitioners' criticism of the quality of the record in this case (petition at 32) is curious to say the least. While claiming that the record is "wholly devoid of legal quality and competency," petitioners in fact rely upon evidence within the record, particularly the so-called "expert" report, to support their argument that genuine issues of fact existed as to the propriety of the settlement. *See, e.g.*, Petition at 17, 26. Indeed, petitioners' frequent reference to the existence of such issues of fact belies their claim that the record was inadequately developed and did not contain sufficient evidence on both sides of the dispute.

precedential value, (b) no error of law by the District Court appeared, and (c) this is a civil diversity case that does not turn upon an interpretation of the Federal Rules of Civil Procedure or any Rule of Evidence.*

Simply stated, this is a straightforward, fairly routine dispute involving the arm's-length, negotiated settlement of a derivative action. There is nothing so unique about this case that the public interest would compel further review. See our discussion *supra* at 17-19. No issues of first impression or important questions affecting the public interest were raised or determined. *Compare Patterson* v. *Newspaper and Mail Deliverers' Union*, 384 F. Supp. 585, 588 (S.D.N.Y. 1974), *aff'd*, 514 F.2d 767 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (more extensive discussion of merits of settlement by district court is warranted because interests involved in employment discrimination case are far broader than those of the particular litigants). In such a case, an extensive written opinion by the Third Circuit would have no precedential value.

Moreover, we have demonstrated, first, that the District Court's decision involved no legal questions, and second, that the absence of a written opinion from the District Court presents no error of law. See *supra* at 19-24.

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* Petitioners have not properly set forth the terms of Chapter 6, Section A(1)(b)(5) of the Third Circuit Internal Operating Procedures. That Section actually reads: "(5) That the appeal is a civil diversity case under 28 U.S.C. § 1332, the result of which does not turn upon an interpretation of the Federal Rules of Civil Procedure or any Rules of Evidence for the United States District Courts and Magistrates."

The only other legal matter raised by petitioners concerns whether the issuance by CJI of the new Class C common stock having three votes per share as part of the recapitalization violated Section 14A:7-2 of the New Jersey Business Corporation Act and the ruling of the court in *Asarco* v. *M.R.H. Holmes a Court*, 611 F. Supp. 468 (D.N.J. 1985). However, as we pointed out to the Court of Appeals, the issuance of the new Class C common stock is entirely consistent with the *Asarco* decision. What that case prohibits is the redistribution of voting power within a given class of stock. It does not prohibit the issuance of a new class of stock with superior voting rights. *Id.* at 477. The Class C common stock issued by CJI was an entirely new class of stock and, as such, could possess voting rights different from the other common stock.

Finally, the jurisdiction of the District Court in this case was founded upon diversity of citizenship. The decisions below do not turn upon the interpretation of any Federal Rule of Civil Procedure or any Rule of Evidence. We already have demonstrated, *supra* at 21, that petitioners' reliance on Rule 52(a) is entirely misplaced: On its face, that Rule does not apply here.

For all these reasons, the instant case is precisely the kind of case which the Third Circuit envisioned could be terminated expeditiously by means of a judgment order. The decision by the Third Circuit panel to so terminate this action is thus entirely consistent with that Court's internal procedures.

CONCLUSION

The petition for writ of certiorari presents no issue worthy of review by this Court, and should be denied.

New York, New York
September 25, 1987

Respectfully submitted,

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